TRIBAL SUPREME COURT PROJECT MEMORANDUM

FEBRUARY 28, 2005

UPDATES ON RECENT CASES

The Tribal Supreme Court Project is part of the Tribal Sovereignty Protection Initiative and is staffed by the Native American Rights Fund (NARF) and the National Congress of American Indians (NCAI). The Project was formed in 2001 in response to a series of U.S. Supreme Court cases that negatively affected tribal sovereignty. The purpose of the Project is to promote greater coordination and to improve strategy on litigation that may affect the rights of all Indian tribes. We encourage Indian tribes and their attorneys to coordinate their efforts, especially at the time of petition for certiorari, prior to the Supreme Court's acceptance of review.

Following a major victory for Tribes in *United States v. Lara,* the Tribal Supreme Court Project remains very busy, monitoring numerous cases at various stages within both state and federal courts, while directly participating in the preparation of several amicus briefs in the U.S. Circuit Courts of Appeals and in the U.S. Supreme Court. The Project recently expanded its efforts, becoming more involved in coordinating and drafting tribal amicus briefs in the federal circuit courts of appeal.

CASES PENDING BEFORE THE U.S. SUPREME COURT

CITY OF SHERRILL V. NORTON - On June 28, 2004, the Supreme Court granted the petition for certiorari in *City of Sherrill v. Oneida Indian Nation of New York* (03-855) 337 F.3d 139 (2nd Cir. 2003). The case presents several important issues to the Supreme Court for review. First, the case presents questions regarding tribal land claims under the Non-Intercourse Act. The Oneida Indian Nation of New York is pursuing a claim for 300,000 acres of reservation land that was later sold without the consent of the federal government. In the late 1990's, the Oneidas reacquired several small parcels of land that lie within the disputed area. The 2nd Circuit Court of Appeals held that the City of Sherrill may not impose property taxes on that land because the underlying aboriginal or "Indian" title was never extinguished by the federal government.

Second, the City of Sherrill is challenging the 2nd Circuit decision with the argument that the land does not meet the definition of "Indian country" established by the Supreme Court in *Alaska v. Native Village of Venetie* (1998). In this regard, a Supreme Court decision could impact tribes for whom the status of ""Indian country"" remains in question. Third, the City of Sherrill also raises an argument that a subsequent 1838 treaty resulted in the disestablishment of the Oneida reservation. The resolution of this question could impact tribes for whom there are questions of reservation disestablishment or diminishment. The City of Sherrill also argues that the Oneidas ceased to exist as a tribe for a period of time and thus the protections of the Non-Intercourse Act do not extend beyond the 19th century.

The Tribal Supreme Court Project has been working with the attorneys for the Oneida Nation, as well as attorneys for other Indian tribes in New York and around the country, to coordinate a tribal amicus brief strategy. On September 30, 2004, four tribal amicus briefs were filed in support of the Oneida Nation: (1) a New York Tribes' brief which specifically addresses the issues raised by the City of Sherrill in

relation to the Nonintercourse Act and its application to Indian tribes within New York; (2) an NCAI brief on the fundamental principle's of federal Indian law regarding: (a) what is "Indian country"; (b) what are the standards for finding disestablishment of a reservation; (c) what are the rules for taxing Indian tribes; (3) an USET brief which specifically addresses the issue of federal recognition and tribal continuity; and (4) a "Brandeis" brief which addresses the so-called "flood-gate" argument by the City of Sherrill and informs the Court regarding numerous cooperative agreements between Indian tribes, states and local governments regarding issues related to taxation, land use and other jurisdictional matters. Oral arguments should be scheduled in early 2005.

CHEROKEE NATION CASES – On Monday, March 22, 2004, the U.S. Supreme Court accepted for review two cases impacting federal funding of self-determination contracts and self-governance compacts between Indian tribes and the United States. In C*herokee Nation of Oklahoma and Shoshone-Paiute Tribes of the Duck Valley Reservation v. Thompson* (No. 02-1472), the Tenth Circuit Court of Appeals held that the federal government is immune from any liability for its failure to pay full contract support costs to Indian tribes in the mid 1990's, a period during which Congress did not place a statutory cap on the amounts the Indian Health Service (IHS) could lawfully pay tribal contractors. However, in *Thompson v. Cherokee Nation of Oklahoma* (No. 03-853), the Federal Circuit Court of Appeals reached the opposite conclusion, awarding the Cherokee Nation $8.5 million in damages for the IHS' failure to fully pay contract support costs during this period.

NCAI, through the Tribal Supreme Court Project, worked together with the attorneys representing Cherokee Nation, Shoshone Paiute and other Indian tribes in the preparation of an amicus brief arguing that that Indian tribes are entitled to enforce their contracts in federal court when federal agencies breach the terms of those contracts. The resolution of these disputes by the U.S. Supreme Court has potentially far-reaching implications for Indian tribes administering programs pursuant to self-determination contracts or self-governance compacts. The United States has taken the position that since self-determination contracts are not government procurement contracts, Indian tribes are not entitled to the same protections afforded other government contractors. According to the United States, self-determination contracts are merely "governmental funding arrangements . . . constrained by the availability of appropriations and the need to allocate funds among competing needs." Allowing the Secretary to exercise such discretion runs contrary to Congress' intent to fully implement its Indian self-determination policy.

These cases are critically important to all Indian tribes since every tribe in the country has one or more self-determination contracts or self-governance compacts with the IHS and the BIA, and this is the first opportunity for the U.S. Supreme Court to review and consider the enforceability of the Indian Self Determination Act (ISDA). Ensuring the proper interpretation of the the ISDA also protects one of the foundations of modern federal Indian law. These cases have been consolidated for an anticipated November 2004 oral argument.

CERTIORARI DENIED BY THE U.S. SUPREME COURT

SOUTH DAKOTA V. CUMMINGS – On July 12, 2004, the State of South Dakota asked the U.S. Supreme Court to review the South Dakota Supreme Court's decision in *South Dakota v. Cummings,* and expand the *Nevada v. Hicks* decision to vastly increase the jurisdiction of states to enter Indian reservations in connection with crimes committed off-reservation ("hot pursuit" exception). The Project offered its assistance in coordinating opposition to the petition for certiorari, since the certiorari stage is where we have our best opportunity to convince the Supreme Court not to take this case. Ian Gershengorn from the

law firm of Jenner & Block worked with Mr. Cumming's attorney Rena Atchison in filing the opposition brief.

In general, the State of South Dakota argued that the Court's decision in *Nevada v. Hicks* authorizes state officers to enter Indian reservations to make an arrest of a tribal member, and to conduct a search for evidence, when the tribal member is being investigated for an off-reservation crime. This argument is a gross distortion of *Nevada v. Hicks*, which held only that tribal courts do not have jurisdiction over state law enforcement officers. The South Dakota Supreme Court upheld the suppression of the evidence and distinguished *Nevada v. Hicks*. On

CASES PENDING BEFORE THE U.S. COURTS OF APPEAL

CARCIERI V. NORTON - The U.S. Court of Appeals for the First Circuit is considering a case that broadly challenges the authority of the Secretary of Interior to take land into trust for an Indian tribe under Section 5 of the Indian Reorganization Act (IRA). The case is on appeal from a district court decision in favor of the Secretary's acquisition of land in trust for the Narragansett Tribe. *Carcieri v. Norton* 290 F.Supp.2d 167 (D.R.I. 2003).

Highlighting the significance of this case, a group of ten state Attorneys General, led by South Dakota and Connecticut, submitted an amicus brief making arguments that could affect many tribes. This is clearly part of a coordinated strategy by these states to mount more significant legal challenges to trust land acquisition. First, the ten states opened with the novel argument that the IRA does not apply to any tribe not "under federal jurisdiction" in 1934. Second, in an effort to stop all trust acquisitions, the states push a very broad argument that Section 5 is an unconstitutional delegation of legislative authority. Third, the states argue that taking land into trust violates both the Enclave Clause and the Tenth Amendment under the U.S. Constitution.

The Tribal Supreme Court Project coordinated the writing of two amicus briefs in the case which were submitted on April 20, 2003. The first amicus brief was prepared pro bono by the law firms of Jenner & Block and Kanji & Katzen in coordination with NCAI and NARF. On behalf of the member tribes of NCAI and USET, as well as 40 individually named Indian tribes, this amicus brief focused on the first two issues – eligibility to participate in the IRA and the non-delegation argument. The Mississippi Band of Choctaw submitted a separate amicus brief covering the states' third argument. Oral arguments were heard on September 17, 2004. In a first for the Project, the U.S. consented to argument time for NCAI, which was represented by Riyaz Kanji.

DOE V. MANN - On September 29, 2003, the Federal District Court for the Northern District of California issued an opinion denying tribal exclusive jurisdiction over a child custody decision involving an Indian child within the boundaries of an Indian reservation. The district court held that under the Indian Child Welfare Act, tribes that fall under Public Law 280 do not have the "exclusive jurisdiction" provided by ICWA Section 1911(a). This decision is being appealed to the Ninth Circuit Court of Appeals, and the Tribal Supreme Court Project worked to encourage the preparation of several amicus briefs in support of the tribal position. This is likely to be a very important case for the applicability of the Indian Child Welfare Act in P.L. 280 states. Oral arguments were held on October 6, 2004.

CASES BEING MONITORED

The Tribal Supreme Court Project monitors numerous cases at various stages within both state and federal courts. NARF maintains and updates a database on its website (www.narf.org) for each petition of certiorari to the U.S. Supreme Court involving an Indian law issue. Each petition is reviewed and evaluated by attorneys working with the Project and we are very interested in providing assistance at the certiorari stage. The Project has recently been contacted by a number of tribal attorneys seeking assistance, or has identified cases of interest moving through the lower federal courts, the state courts, or various administrative agencies. A sample of the cases being monitored by the Project include:

MORRIS V. TANNER; MEANS V. NAVAJO NATION – Both of these cases are pending before the Ninth Circuit and involve equal protection and due process challenges to the Duro amendment and tribal criminal jurisdiction over non-member Indians. In *U.S. v. Lara*, the U.S. Supreme Court upheld tribal criminal jurisdiction over nonmember Indians, holding that the Duro amendment is an affirmation of tribal inherent authority. However, the Court left open the issue of whether a tribal prosecution of nonmember Indian may be challenged under the Duro amendment based on an equal protection challenge and/or for lack of due process.

PRAIRIE BAND POTAWATAMI NATION V. RICHARDS – In a very significant case for tribal sovereignty, the 10th Circuit recently invalidated the application of the Kansas motor fuel tax to tribal sales to non-Indian motorists. Significantly, the court held that the Nation was not "marketing a tax exemption" but instead its gas station was an essential part of its on-reservation gaming enterprise – particularly where the Nation charged a tax equal to the state tax and the Nation built and maintained the transportation infrastructure on its rural reservation. It appears likely that Kansas will appeal this decision.

SMITH V. SALISH KOOTENAI COLLEGE – This case addresses whether an Indian tribe has civil jurisdiction over tort action that arose as a result of a traffic accident on a public highway within the Reservation which involved a non-member Indian who was a student at the tribal college and who was driving the vehicle as part of a vocational program at the college. A three-judge panel of the Ninth Circuit held that, under these facts, neither of the two *Montana* exceptions apply and, therefore, the tribal courts do not have adjudicatory authority over this matter. Motions for rehearing and rehearing en banc were recently filed.

ATKINSON TRADING COMPANY V. MANYGOATS – This case involves the scope of tribal civil jurisdiction over non-Indian employers located on the Navajo Reservation under the *Montana* test. In this case, Manygoats filed a wrongful termination complaint with Navajo Nation Labor Commission and prevailed. Atkinson appealed to Navajo Nation Supreme Court, but before the appeal was heard, Atkinson filed a complaint in US District Court claiming that the Navajo Nation lacks civil regulatory jurisdiction over its employment practices. The U.S. District Court granted summary judgment in favor of Atkinson, finding that neither Montana exception applied. Currently, the case has been appealed to the Ninth Circuit and has been referred to a mediator who has been talking with all the parties about ways to settle the case.

CONTRIBUTIONS TO SUPREME COURT PROJECT: As always, NCAI and NARF welcome general contributions to the Tribal Supreme Court Project. Please send any general contributions to NCAI, attn: Sharon Ivy, 1301 Connecticut Ave., NW, Suite 200, Washington, DC 20036.

Please contact us if you have any questions or if we can be of assistance. John Dossett, NCAI General Counsel, 503-248-0783 (jdossett@ncai.org) or Richard Guest, NARF Staff Attorney, 202-785-4166 (richardg@narf.org).